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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 508

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff and Respondent,
vs.
EWELL C. QUALLS,
Defendant and Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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The defendant and petitioner Ewell C. Qualls prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Michigan as of July 23, 1968 denying defendant's application for leave to appeal from the decision of the Court of Appeals of the State of Michigan as of March 21, 1968 affirming the conviction of the charge of voluntary manslaughter in the death of Mervyn Shewell in the Circuit Court for the County of Wayne, Michigan as of October 20, 1966.

OPINIONS BELOW

The opinion of the Court of Appeals for the State of Michigan entered March 21, 1968 is reported as 9 Michigan Appeal Reports P. 689 and is contained in the appendix and known as Exhibit A; The opinion of the Court of Appeals of the State of Michigan denying defendant's motion for rehearing and dated May 1, 1968 is contained in the appendix and known as Exhibit B; the opinion of the Supreme Court of the State of Michigan dated July 23, 1968 denying defendant's application for leave to appeal from the judgment of the Court of Appeals is contained in the appendix and known as Exhibit C; the opinion of the trial judge taking defendant's motion for a directed verdict under advisement is contained as page 16 of the statement; the motion for rehearing filed in the Court of Appeals dated March 29, 1968 is known as Exhibit D and specifies federal constitutional grounds as the basis thereof.

JURISDICTION

The judgment of the Supreme Court of the State of Michigan was entered on July 23, 1968 (Appendix, Exhibit C). The jurisdiction of the Court is invoked under 28 U.S. Code 1257 (3).

QUESTIONS PRESENTED

1. In a state criminal action where the defendant makes a motion for a directed verdict of "not guilty" at the conclusion of the People's case does the failure of the trial judge to decide such motion thereby requiring the defendant to make an election as to whether to testify on his

own behalf or remain silent constitute such coercion as to violate the Fifth Amendment to the United States Constitution?

2. Where counsel for a defendant in a state criminal action is berated by a third person in the presence of a juror and outside of the courtroom, does the failure of the trial judge to conduct an investigation of such incident or in the alternative grant defendant's motion for a mistrial a denial of the *Sixth* amendment to the United States Constitution?

3. Where while in custody a defendant in a state criminal action while making admissions to police officers demands the presence of an attorney, are such admissions admissible in evidence?

CONSTITUTIONAL AMENDMENTS INVOLVED

a. U. S. Constitution	Article V—incrimination Article VI—trial by jury Article XIV—due process
b. State of Michigan 1963 Constitution	Article I Section 17—Self incrimination Section 20—trial by impartial jury

STATEMENT

The defendant Ewell C. Qualls was charged in an information filed in the Circuit Court for the County of Wayne with the commission of the crime of manslaughter. The evidence indicated that on April 3, 1965 the Highland Park Police Department received a call that a shooting had taken place at 115 Ferris Street, Highland Park, Michigan. Upon arrival at that address at about 5:45 a.m. Police officers saw the defendant in the doorway of that home with a gun in his right hand. He motioned the officers to come into the house. Upon entering they found two bodies, one identified as Erwin Kopas and the other later identified as Mervyn Shewell. He was taken to the Highland Park Police Station; questioned for about four hours in the presence of a number of police officers; during such time he was given coffee as a stimulant. Excerpts from the trial transcript pertaining to both the circumstances surrounding such examination and the admissions made by defendant follow:

> Q. Now, witness, did you have an occasion to be present at the Highland Park Police Department with the defendant at which time certain questions were asked of him?
>
> A. Yes, sir, I was.
>
> Q. And when was that?
>
> A. The same morning, April 3rd, at approximately 8:55 a.m.
>
> Q. And who was present at that time?
>
> A. Detective Lorden and Sgt. Edward McLean, uniformed Sergeant that testified earlier.
>
> Q. The three officers and Mr. Qualls, is that correct?
>
> A. Yes.
>
> Q. All right. And as a preliminary to asking him any questions regarding this, did anyone made any statements to him?

A. Yes, I apprized him of his constitutional rights. I informed him that he need not tell us anything. Anything he does tell us could be used against him. That he was entitled to counsel. He could have an attorney present while we talked to him.

Q. All right. And what followed that preliminary statement by you to Mr. Qualls?

A. He stated, well, I, he wanted to tell us what happened, wanted, he said "I want to tell you what happened."

Q. All right. And did you make notes of that conversation, witness?

A. Yes, I did make notes.

Q. And were a copy of those notes to your knowledge served on defendant counsel?

A. I believe so.

Q. All right. Would you then, witness, tell us of your conversation or read us your notes?

Mr. Louisell: No, no. I am going to object to his reading of his notes. He can tell us of his conversation, and he can use, if he wishes, use the notes to assist him in refreshing his recollection, but I am going to object to his reading the notes. They are not a statement. They are not binding on the defendant in any shape, way or form. They are his notes.

Page 207 Transcript:

Q. Did they make any notes?

A. Not to my knowledge.

Q. What would you do? Would you write down as you went along, or would you talk for a while and then write something down?

A. Seemed like we would ask a question, a question would be asked and an answer ascertained, and then I would write the question and answer.

Q. Well, the three and a half longhand pages of your writing, your notes, and incidentally a third or so or maybe a fourth of the page is letter-head, and you didn't write on that, did you?

A. No, sir.

Q. Certainly there was more said during this hour, hour and a half, then that which is recorded in these notes, isn't there?

A. Well, we did offer Mr. Qualls coffee at one time.

Q. Well, that doesn't answer my question, of course.

A. Well, yes, everything isn't here word for word. No, sir.

Q. Well, now, you say "word for word." There is a great deal that Mr. Qualls told you at that time that you did not write down, isn't there?

A. I don't know. I'll be honest with you.

Q. You don't know. Well, we know that at least this, that he told you that the men stood up when they threatened that they would do something to his daughter, and you didn't write that down. We know that for sure anyway.

A. Yes.

Page 202 Transcript:

We asked him where he had first encountered Mr. Kopas and Mr. Shewell, and he stated at the Kendall Bar. We asked him if they had any drinks together and he said, "Yes." Asked him if they left the bar "with you" and he said, "Yes".

We asked him where he got the whiskey. He stated at a party store on Hamilton. We asked him, "You took them home with you", and he said, "I'm not going to say that. I don't know." And, "I'm not going to say *until I get my attorney in regard to this particular question.*"

Then we asked him if at any time during the evening whether they hit him, grabbed him, molested him or went through his person.

Mr. Louisell: Well, now, if your Honor please, from that point on I'm going to object to the witness reading from his interrogation because it appears at that juncture, in any event, Mr. Qualls

exercised that which is his right and his privilege and asked for an attorney. (My italics.)

Page 206 Transcript:

Q. Now, there were present at the time you spoke with Mr. Qualls, Sgt. McLean?
A. Yes, sir.
Q. And also Detective Gordon, is that right?
A. Lorden, sir.
Q. Lorden?
A. Yes, sir.
Q. And what time of the day did you question Mr. Qualls?
A. About 8:55 a.m., 9 a.m. in the morning.
Q. And this took place in the Police Headquarters at the Highland Park Police Department?
A. Yes, sir.
Q. Now, how long were you occupied with Mr. Qualls in talking to him?
A. I would have to approximate. Anywhere from an hour to hour and a half.
Q. And did you have some four pages, or three and a half pages of longhand notes, is that right?
A. Yes, sir.
Q. And you were with him sometime between an hour and hour and a half?
A. Yes, sir.

At the trial of said cause the State elected to submit to the jury the issue as to whether the act of the defendant with respect to the killing of Erwin Kopas was voluntary and without malice.

Transcript, pages 17-18:

Mr. Groat: Thank you, your Honor. Ladies and gentlemen of the jury, it is the people's theory in this case that the death of Mr. Shewell, this manslaughter that is being charged, resulted from the voluntary acts of this defendant, Mr. Qualls. That

after consuming what would apparently be a great quantity of liquor he voluntarily introduced his gun into this social activity. He voluntarily went upstairs and obtained this gun and brought it downstairs.

The voluntary act of the defendant in shooting five times. We will show you that that gun was fired five times, that Mr. Shewell was shot three times and the other man, Mr. Kopas was wounded twice. That there was no malice apparently on the part of the deceased as they were singing and at one point the other man was snoring, sleeping. From the position of the body of Mr. Shewell that he was apparently seated in this chair. That something happened to the defendant as they were seated there, perhaps worse, perhaps the extensive use of alcohol made him take this gun, stand up and fire five times at the two men who were seated or standing around the table, killing Mr. Shewell.

It is, of course, difficult to know what was in the defendant's mind at the time of the shooting because we, of course are not mind readers.

It is difficult to show what occurred in a closed room with three people, two of whom are dead and the other man here on trial, but we feel that the testimony and the evidence will show to you that this was a voluntary act on the part of the defendant, Mr. Qualls, resulting in the death of Mr. Shewell, thank you.

The admissions of the defendant as heretofore set forth were introduced in evidence subject to objection. During the trial because of the conduct of Thomas Kopas, a brother of the deceased the attorney for the defendant made a motion for a mistrial. Following is an excerpt from the transcript which sets forth in detail the nature of the motion, the proceedings following the making of such motion and its disposition.

Transcript pages 291-298:

(The jury was not present in the Courtroom, and the following proceedings took place.)

Mr. Louisell: If your Honor please, a very unfortunate thing occurred yesterday afternoon after Court had recessed and the Qualls family and I were going down in the elevator.

The Court: Pardon me?

Mr. Louisell: The Qualls and I were going down on an elevator on which as a passenger was the juror who sits in the back row with the mustache. I don't recall his name, but he had his juror button on indicating that he was a juror, and a relative of the deceased, Mr. Kopas, in a very loud, and to disturbing way, started criticizing me, referring to me as a degenerate for defending persons *such as Mr. Qualls,* and I tried to still him by suggesting to him that it was indiscreet for him to talk in that fashion in the presence of the juror, but he wouldn't be quieted, and he persisted all the time riding down the elevator in this verbal attack on me, and the attack on me isn't of any great concern to me, but in characterizing my *representation of Mr. Qualls* as being—I can't recall the exact words that he used, but it was, oh, derogatory, in any event, for defending a *person like Mr. Qualls* in this case.

I think it extremely unfortunate and obviously is a situation over which the prosecution had no control of any kind. I have no way of knowing what influence, if any, or effect, if any, the statements of this man might have upon the jury, but I feel constrained to bring it to your Honor's attention and ask for a mistrial. (My italics.)

The Court: What exactly was said now? The attack was on you personally for defending a person like Mr. Qualls. Was anything added to that indicating a basis for the person's opinion?

Mr. Louisell: The over impression, without attempting to quote the language that the man used was that it was a degenerate profession or practice. Well, he didn't use the word evil, but the connotation was that it was an evil thing for me to be defending a man like Mr. Qualls who himself was an evil person.

The Court: Is that person here in Court?

Mr. Groat: I don't know, your Honor.

Mr. Louisell: Yes, he is, your Honor.

The Court: Have him step up here, please.

What is your name, please?

Mr. Kopas: Tom Kopas, Thomas Kopas.

The Court: You are related to one of the deceased?

Mr. Kopas: Yes, I am his brother.

The Court: Where do you live, Mr. Kopas?

Mr. Kopas: 1825 Euclid.

The Court: Is that in Detroit?

Mr. Kopas: Lincoln Park.

The Court: You've heard, have you, what counsel for the defendant has had to say with regard to your remarks in the elevator?

Mr. Kopas: I have. I heard a series of lies.

The Court: Were you in the elevator?

Mr. Kopas: Yes, I was.

The Court: What did you say?

Mr. Kopas: And I'm not aware that there was any juror, which I doubt but what in essence, if I can recall to mind exactly.

The Court: Were there other people in the elevator?

Mr. Kopas: Yes, there was my wife and some counsel of his. That to my awareness was all that was in the elevator, and as to regards as what I recall exactly what I said. I said, I asked him, I said, "Are you happy in your chosen profession?" I said, "I know you're happy in your chosen profession." And I didn't recall the response that I got from him, and there was no mention whatsoever

of Qualls. I just told him that my opinion of him was very low in his type of line of work he's doing and if there was a hell anywhere he would find it and that's exactly as far as I can remember, that was the exact words. There was no mention of this particular case, or in essence it was just like he says, a personal attack on his character. He quoted it. It was my feeling at the time and it's all that was said. My wife was with me. If you'd like she could testify to what was said in that area.

Mr. Louisell: May I inquire?

The Court: Yes.

Mr. Louisell: Do you recall my telling you that it was indiscreet to speak in the presence of the jurors?

Mr. Kopas: No, I don't.

The Court: What do you do for a living, Mr. Kopas?

Mr. Kopas: I'm a crib attendant, tool crib attendant.

The Court: Mr. Kopas, I can understand your being upset because of the death of your brother and the manner in which he met his death, but that doesn't give you any right to go around deciding what other people should do for a living, particularly in public place, particularly under circumstances such as this which might well cause a mistrial in this case. That conduct might well land you in jail.

Mr. Kopas: It seems—well, I'm aware of the serious now. I never gave it any more thought and that possible repercussions could occur in such a thing. It wasn't the occupation.

The Court: Do you understand, Mr. Kopas, that if the circumstances had been reversed, that if somebody else had a gun, your brother for example, and shot Mr. Qualls, that he might well be here on trial and he might well have Mr. Louisell representing him? Do you understand that? Would you want your

brother to face a jury or a court without an attorney, or would you want an attorney if he were accused of a crime?

Mr. Kopas: I would want an attorney, sir, certainly.

The Court: And you would want probably one of the best you could get?

Mr. Kopas: Yes, sir.

The Court: One who specializes in the defense of criminal cases?

Mr. Kopas: With the exception of counsel present.

The Court: Well, you don't know that. Your whole approach to this is quite emotional, in my opinion, which is understandable, but that doesn't give you any right to speak out as you did.

Now I think you should keep in mind that you are understandably emotional about this, and in view of that that you ought to make an extra attempt to keep quiet and not enter into the trial of this case.

You are a spectator in this matter no matter how close you are to the deceased. You are still a spectator. You are not a participant in this trial. If you don't keep that in mind you will get into serious trouble, and I'm not sure yet what the extent of that trouble is.

It will depend on what happens in this case and what impression the juror got as a result of hearing that conversation. Now, you know your own makeup and your own limitations. If you feel that you can't keep quiet and can't keep yourself under control, then don't come in here, and that goes for everyone in the courtroom.

I am well aware that under all the circumstances of a case of this type emotions are going to run high. People are going to take different perspectives, different views, but that's why they have Courts and juries to decide things.

Now, it may well be that the family of Mr. Qualls takes the same view that you do of the prosecutor and the police department, which is understandable because they have a rather narrow viewpoint just as you have, but these people are both doing the job that they have to do.

And the Court has a job to do and the jury has its job, and that job must be done without any outside influence or any threats or any coercion or any intimidation, and I'll tell you right now if there's any repetition of things like this you're going to wind up in jail. Now I want to make that very clear to you. You may be seated. Bring the jury in please.

(Whereupon the jury came into the Courtroom at 10 o'clock a.m. and the following proceedings took place.)

The Court: Good morning, members of the jury, I would like to ask all of you at this time if, since the start of this case there has been any occurrence or any incident or any remarks or statement made to any of you outside of the Courtroom, or made in your presence outside of the Courtroom, which in any way would influence your thinking or your verdict in this case, or which you think might influence your thinking of your verdict in this case?

There has been drawn to the Court's attention an incident which it is alleged occurred yesterday, and a statement made which possibly might influence a juror if such a statement were made in the presence of a juror.

It is believed on one hand that juror might have been present when the statement was made. There also is a school of thought that there was no juror present. I'm just wondering if any of you recall from the time you've begun your duty on this case up until this morning if you can recall or think of any incident or occurrence outside of the Courtroom which would in any way influence your thinking or your verdict in this case, or tend to prejudice you in any way against one side or the other?

Are there any other questions that counsel would like the Court to put to the jurors?

Mr. Groat: No, your Honor.
The Court: Mr. Louisell?
Mr. Louisell: I think not, your Honor.
The Court: All right. Will you have—I think the defendant was on the stand.
Mr. Louisell: Yes, on the stand.

No response was made by any of the jurors to the questions of the Court. There is nothing in the record to indicate that defendant was satisfied with the Court's inquiry.

During the trial the assistant prosecution attorney questioned Joyce Qualls, a daughter of the defendant as follows:

Record page 192:

By Mr. Groat:

Q. Joyce, after you heard your father call, "Hazel" and "Joyce", did you hear your father say, "I'm going to kill both of you, here's one for you and one for you."
A. No.
Mr. Groat: No further questions.
Mr. Louisell: No further questions.
The Court: You may step down, witness. (Whereupon the witness was excused.)
Mr. Louisell: I wonder if your Honor please, would instruct the jury that the mere putting of a question by an attorney is certainly not evidence when you elicit a negative answer such as he elicited now in this last question. As a matter of fact it was a leading question and an improper question.
The Court: Well, it was improper in that it assumed a fact not in evidence, and I will sustain the objection. The manner in which it was asked assumed a fact not in evidence so the objection is sustained.

After the state rested the defendant made a motion for a directed verdict of acquittal for the reason that the State did not prove the elements of voluntary manslaughter.

The motion was taken under advisement. Excerpt from the record pertaining to such motion follows:

Transcript pages 235-36; 248-249:

> Mr. Louisell: If your Honor please, when the prosecution yesterday, after much deliberation and consideration concluded that he would proceed on the theory that this was a voluntary as distinct from an involuntary homicide, he undertook, as I understand the law, to prove a homicide, that occurred in the heat of passion, before blood had time to cool, with adequate provocation.
>
> I think he undertook to prove everything that is really involved, having undertaken to prove voluntary manslaughter, everything that's involved in either murder in the first or second degree, except that he need not prove premeditation or malice aforethought or malice prepense.
>
> But we have now here a situation on the record with the homicide as to which there is only one explanation, and that is the explanation that was given, such as it was, given by the defendant at the time he was interviewed by the police officers.
>
> And we have not on the record, I respectfully submit, any testimony from which the jury could infer that this was a homicide that occurred in a sudden affray where there was adequate provocation, or the other classic elements in a voluntary homicide present, and for that reason I respectfully request that the Court direct a judgment of not guilty.
>
> • • • • •
>
> The Court: I'm under the impression, perhaps erroneously so, that under the new General Court Rules, it would be permissible to take under advisement the motion for directed verdict in a criminal case unless there's some specific provision that precludes, but generally GCR are applicable to criminal cases wherever they can reasonably be applied, and my inclination at the moment is to take under advisement the motion for directed verdict.

I think there is a great deal of merit to what you say, Mr. Louisell, that the record is either totally devoid of any showing of the essential ingredients of homicide, or rather as to manslaughter, a species of homicide, if you exclude and totally disbelieve the defendant's statements to the police officer, and if you accept those you may well have justifiable homicide, but I think, generally, what is justifiable homicide depends on all of the circumstances apparent in a given case, and that suggests to me that possibly that would be a question of fact for the jury.

I don't know of any case or any rule that says when you have the following ingredients that as a matter of law the case should be taken from the jury.

My inclination at the moment—and I'll read the case you cite—my inclination at the moment is to take the motion under advisement and proceed with the case, but I will read the case you cite to me.

Mr. Louisell: All right.

The Court: But I think it's been said several times here that the dilemma of the prosecution is the plain fact of the matter is there are no witnesses to what went on except the defendant, and I don't think the jury is required to accept what he says in toto or, in the alternative, reject what he says in toto.

They may believe some of those statements and reject others and that I think would be material in arriving at the judgment of whether or not this was a justifiable homicide, and as I say, tentatively at least that area, namely whether or not it was justifiable homicide would probably be a question for the jury, but I will take under advisement, the motion for directed verdict and I will read the case you cite.

After both sides rested the defendant renewed his motion for a directed verdict. It was taken under advise-

ment. Excerpts from the transcript pertaining to such motion and its disposition follow:

Transcript pages 380-381:

> Mr. Louisell: Well, I would renew my motion at this time again for the directed judgment of acquittal, and I would only, in addition to what was said at the time of the closing of the proofs by the People bring to the Court's attention that, of course, the rule of law with respect to what force may be used in repelling an assault or a threat in one's home is different than it is elsewhere from one's home, and whereas the general rule is that a person is entitled to use such force as he, under the circumstances, as it reasonably appeared to him at the time indicated to be necessary, and not by the objective standard that might be employed looking at it in retrospect.
>
> That with respect to the use of force in a home that the law still is, I believe, that one does not need to retreat and it is still the law of the land that man's home is his castle, and he can protect himself and defend himself and his family and his property in his home by standards other than would be applicable away from home.
>
> The Court: Well, I think that the Court will adhere to the earlier ruling and take the motion under advisement at this time.

The defendant was convicted by the jury on October 21, 1966. Apparently the trial judge felt that there was merit in the claim of his counsel as to the sufficiency of the evidence. He released the defendant on personal bond. A motion for reconsideration of the motion for a directed verdict of acquittal was filed by the defendant on November 29, 1966 and denied by its trial judge on January 9, 1967. The defendant was sentenced to the State Prison on that day for a period not less than four years nor more than fifteen years. His personal bond was continued. A claim

supplied by the defendant should he take the stand. The defendant was in a quandary. Should he elect to remain silent and await the decision of the trial judge at the conclusion of the case or testify since it was possible his motion would be denied. I submit such practice places a penalty on the exercise of a person's right not to be compelled to be a witness against himself and thereby violates the Fifth Amendment and is a form of coercion and in violation of the Fifth Amendment.

> In a criminal case, where a motion or request is made for a judgment of acquittal or a directed verdict or affirmative charge in favor of accused the court has a clear duty to act on such motion or request.
>
> 23A CJS 38.

> When an accused demurs to the evidence, regardless of the prosecution's concurrence or joinder therein, the Court must act on it and either sustain it or overrule it.
>
> 23A CJS 354.

2. The decision of the Court of Appeals for the State of Michigan with respect to the question as to whether the defendant was tried by an impartial jury is in conflict with this Court's decision in the case of *Parker v. Glidden*, 87 Supreme Court Reporter 468 wherein the Court held:

> "Aside from this we believe that the unauthorized conduct of the bailiff 'involves such a probability that prejudice will result that it is deemed inherently lacking in due process.'"

In the case at bar the trial judge erred in denying defendant's motion for a mistrial or in the alternative failed to conduct a proper examination prior to the determina-

tion of such motion as prescribed by law. It is interesting to note that the trial judge at no time actually decided such motion. There are a number of conceded facts. They are:

A. Mr. Louisell was berated and maligned by Thomas Kopas, a relative of the deceased.

B. Although the juror in whose presence such conversation took place was identified by Mr. Louisell, he at no time was questioned by the trial judge.

C. The jurors at no time were advised as to the occurrence of such incident or whether if present; their judgment would be affected thereby.

There is conflict between the statements made by Thomas Kopas and Joseph Louisell. They are:

D. Mr. Louisell was positive the remarks were made in the presence of a juror.

E. Mr. Kopas was not sure that such juror was present.

F. The nature of the remarks made by Thomas Kopas.

The Court of Appeals rested its decision upon Mr. Kopas' version of the incident underlining certain words contained therein. Apparently that Court adopted the position that such remarks took place before "the juror who sits in the back row with the mustache." Let us accept Mr. Kopas' version of the incident.

> "I just told him that my opinion of him was very low in his type or line of work he's doing and if there was a hell anywhere he would find it, and that's exactly as far as I can remember that was the exact words. There was no mention of the particular case or in essence it was just like he says, a personal attack on his character."

The very fact that the Court of Appeals considered this testimony important in itself supports the claim of the defendant that the trial judge should have conducted a hearing so as to determine what actually took place in the elevator, whether the juror was present in the elevator; what actually was said by Thomas Kopas; whether such remarks affected the judgment of such juror. Absent such investigation we have an opinion rendered by an appellate tribunal which casts reflection upon the integrity of a prominent member of the legal profession. Why that Court should accept the version of Thomas Kopas as against Joseph Louisell is difficult to comprehend? In doing so it deprived the defendant of his constitutional rights; a right to have a hearing in open court as to the sufficiency of allegations constituting the basis of a judicial decision. I have underlined the remarks of Mr. Louisell contrary to that of Mr. Kopas.

In *Mattox v. U. S.*, 146 U.S. 140, 148-150 this Court held that such private communication was presumptively prejudicial.

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instruction and direction of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon

> the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Also see *Turner v. Louisiana,* 379 U.S. 473.

> In the constitutional sense trial by jury in a criminal case necessarily implies at the very least that "the evidence developed" against a defendant shall some from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross examination, and of counsel. What happened in this case operated to subvert these basic guarantees of trial by jury.

Richardson v. U. S., 360 Fed. (2) 369 is authority for the rule that a failure of the trial judge to conduct a thorough inquiry constitutes an abuse of discretion.

> The allegation of fact in the third ground of the motion that the witness Treherve engaged in a private conversation with one of the jurors must stand as confessed since no hearing was conducted. Prejudice will be assumed in the form of a rebuttable presumption. *Brown v. U.S.,* 224 (2) 845; *Johnson v. U.S.,* 207 F(2) 314; *Ryan v. U.S.,* App. DC 89 U.S. App. D.C. 328, 191 F(2) 779; *Turner v. State of Louisiana,* 379 U.S. 466, In failing to conduct "a thorough inquiry . . . to determine exactly what . . . occurred before overruling the motion the trial court abused its discretion. *Johnson v. U.S., supra,* 207 F (2) at 322."

3. The admissions by the defendant to members of the Police Department and introduced in evidence were in violation of his constitutional rights.

The trial of the case at bar was held on October 17, 1966 and consequently is subject to the rule of law enunciated in *Miranda v. Arizona,* 86 Supreme Court 1612. It

is true that the objections made to the introduction of these admissions by defendant's counsel did not rest upon Miranda but I assume he was not aware of Miranda at the time. It is to be noted that defendant had not slept that night; he had just been through a harrowing experience; he was all alone with three police officers; he was examined for nearly two hours; it was necessary to give him coffee during that period possibly to keep him awake; he asked for an attorney during such questioning which took place about four hours after his arrest; Miranda, in my opinion rendered such admissions inadmissible.

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney either retained or appointed. The defendant may waive effectuation of these rights provided the waiver is made voluntarily, knowingly and intelligently.
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> *Miranda v. State of Arizona,* 86 Supreme Court 1612.

The record is barren of an intelligent, voluntarily and knowingly waiver on the part of the defendant.

Respectfully submitted,

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